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SUPREME COURT OF THE UNITED STATES

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NO. 80-5053

* * *

JOHN HENRY QUINONES,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

* * *

On Petition For Writ of Certiorari
To The Court of Criminal Appeals
Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... i

QUESTIONS PRESENTED..... 1

OPINION BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 2

REASONS FOR DENYING THE WRIT..... 3

CONCLUSION..... 6

PROOF OF SERVICE..... 7

TABLE OF AUTHORITIES

CASES

Adams v. Texas, ____ U.S. ____, 48 U.S.L.W. 4869 (June 25, 1980)..... 4, 5

Brady v. Maryland, 373 U.S. 83 (1963)..... 5

Cicenia v. LaGay, 357 U.S. 504 (1958)..... 5

Garcia v. State, 581 S.W.2d 168 (Tex.Crim.App. 1979)..... 5

Garrison v. Maggio, 540 F.2d 1271 (5th Cir. 1976)..... 6

Jurek v. Texas, 428 U.S. 262 (1976)..... 1,3,4,5

King v. State, 553 S.W.2d 105 (Tex.Crim.App. 1977), cert. denied, 434 U.S. 1088 (1978)..... 4

Lockett v. Ohio, 438 U.S. 586, 607 (1978)..... 4

Moore v. Illinois, 408 U.S. 786 (1972)..... 6

Quinones v. State, 592 S.W.2d 933 (Tex.Crim.App. 1980)..... 1

United States v. Agurs, 427 U.S. 97 (1976)..... 6

Weatherford v. Bursey, 429 U.S. 545, 560 (1977).... 5

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V..... 2

U.S. CONST. amend. VI..... 2

U.S. CONST. amend. VIII..... 2

U.S. CONST. amend. XIV..... 2

STATUTES

TEX. CODE CRIM. PROC. ANN. art. 37.071..... 1,2,3,4,5

TEX. CODE CRIM. PROC. ANN. art. 36.14..... 4

TEX. CODE CRIM. PROC. ANN. art. 39.14..... 5

TEX. PENAL CODE ANN.§19.03..... 2

TO THE HONORABLE SUPREME COURT OF THE UNTIED STATES:

NOW COMES the State of Texas, Respondent herein, by and through its Attorney General, Mark White, and files this its Brief in Opposition.

QUESTIONS PRESENTED

I. Whether by sanctioning the trial court's refusal to instruct the jury that mitigating evidence may be considered upon the special issues which determine a death sentence under Texas law, the Court of Criminal Appeals eviscerated the very basis on which this Court upheld that law in Jurek vs. Texas, 428 U.S. 262 (1976), and thereby violated petitioner's rights under the Eighth and Fourteenth Amendments.

II. Whether V.A.C.C.P. Article 37.071 is unconstitutional in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and evidence of unadjudicated offenses and hearsay testimony may be presented for jury's consideration in support of the statutory issues and a death sentence.

III. Whether the prosecutor's intentional misrepresentation and the withholding of Petitioner's inculpatory tape recorded statement and the trial court's refusal to allow the discovery of them denied the Petitioner a fair and impartial trial required by the Fifth and Fourteenth Amendments of the U.S. Constitution and the effective assistance of counsel provided for by the Sixth and Fourteenth Amendments of the U.S. Constitution.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as Quinones v. State, 592 S.W.2d 933 (Tex.Crim.App. 1980).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Honorable Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. CONST. amend. V.
2. U.S. CONST. amend. VI.
3. U.S. CONST. amend. VIII.
4. U.S. CONST. amend. XIV.
5. TEX. CODE CRIM. PROC. ANN. art. 37.071
6. TEX. CODE CRIM. PROC. ANN. art. 39.14

STATEMENT OF THE CASE

Petitioner was indicted by the Harris County Grand Jury for the offense of capital murder pursuant to Texas Penal Code §19.03. The indictment alleged that Petitioner, on or about June 15, 1978, intentionally caused the death of Mohamad Ali Vahdat, by shooting him with a gun, while in the course of committing and attempting to commit the offenses of kidnapping and robbery.

Petitioner was tried in the 262nd Judicial District Court of Harris County, Texas. The evidence adduced at trial showed that on June 15, 1978, Petitioner abducted Mr. Vahdat after hijacking the ice cream truck which was being driven by the victim, for the purpose of stealing the victim's truck, money, watch and other personal property. After picking up two companions, Petitioner pistol-whipped Mr. Vahdat, who was driven in the stolen truck to a drive-in theater where Petitioner sexually assaulted the victim and fatally shot him in the head.

Petitioner was later arrested and charged with capital murder after police obtained a tape recording of a conversation between Petitioner and Richard Wayne Collins, a witness to the murder who was cooperating with police after being arrested on unrelated charges.

On September 28, 1978, Petitioner was convicted by a jury of capital murder as alleged in the indictment. Thereafter, on September 29, 1978, the jury returned unanimous affirmative

findings to the special issues submitted pursuant to Article 37.071 of the Texas Code of Criminal Procedure, and Petitioner's punishment was assessed by the trial court at death.

Petitioner's conviction and sentence were affirmed by the Texas Court of Criminal Appeals on January 9, 1980. Petitioner's Motion for Leave to File Motion for Rehearing was denied on February 13, 1980, at which time Petitioner was granted a thirty (30) day stay of execution of mandate.

On March 17, 1980, Mr. Justice Powell continued Petitioner's stay of execution pending the timely filing of a petition for writ of certiorari. Thereafter, on May 6, 1980, Petitioner obtained an extension of time within which to file his Petition for Writ of Certiorari, which was filed in this Court on July 12, 1980.

REASONS FOR DENYING THE WRIT

I.

PETITIONER WAS NOT ENTITLED TO A JURY CHARGE ON MITIGATING EVIDENCE AT THE PUNISHMENT PHASE OF HIS CAPTIAL MURDER TRIAL UNDER ARTICLE 37.071, V.A.C.C.P., WHICH IS CONSTITUTIONAL.

Petitioner is entitled to have the jury consider "whatever evidence of mitigating circumstances the defense can bring before it." Jurek v. Texas, 428 U.S. 262, 273 (1976). However, the Texas Court of Criminal Appeals correctly held that Petitioner's requested jury charge on mitigating evidence is not necessary to protect this right. "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced." Supra at 276.

The Texas capital sentencing statute, Article 37.071, V.A.C.C.P., makes no specific reference to mitigating factors. However, this Court has repeatedly recognized that the second question under Art. 37.071(b)(2), which requires the jury to

determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," has been broadly interpreted by the Texas Court of Criminal Appeals so as to permit the jury to consider "whatever mitigating circumstances the defendant might be able to show." Lockett v. Ohio, 438 U.S. 586, 607 (1978); Jurek v. Texas, supra at 272-273.

In the case sub judice Petitioner was entitled to present any mitigating evidence, and did in fact present such evidence. The trial court duly submitted the special issues pursuant to Art. 37.071 and charged the jury to base their response to the special issues on the evidence presented. The trial court's instructions to the jury complied it all respects with Art. 37.071, the constitutionality of which was recently reaffirmed by this Court in Adams v. Texas, _____ U.S. _____, 48 U.S.L.W. 4869 (June 25, 1980).

The special issues submitted pursuant to Art. 37.071 use terms of common understanding which require no special definition. King v. State, 553 S.W.2d 105 (Tex.Crim.App. 1977), cert. denied, 434 U.S. 1088 (1978). The Texas Court of Criminal Appeals correctly determined that "[t]he jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence." 592 S.W.2d at 947. Moreover, it is submitted that the giving of Petitioner's requested jury instruction would have constituted an improper comment by the trial court on the weight of the evidence, in contravention of Art. 36.14, V.A.C.C.P., just as would the giving of a charge that the jury should consider all aggravating factors in determining their answers to the special issues submitted pursuant to Art. 37.071. Therefore, the denial of Petitioner's requested charge by the trial court was not error.

II.

ARTICLE 37.071, V.A.C.C.P. IS CONSTITUTIONAL, AND EVIDENCE OF UNADJUDICATED OFFENSES WAS PROPERLY ADMITTED AT THE PUNISHMENT PHASE OF PETITIONER'S CAPITAL MURDER TRIAL.

The constitutionality of Art. 37.071 was originally upheld by this Court in Jurek v. Texas, supra, and was recently reaffirmed in Adams v. Texas, supra.

Art. 37.071(a) provides that "evidence may be presented as to any matter that the court deems relevant to sentence" at the punishment phase of a capital murder trial. (emphasis added) The Texas Court of Criminal Appeals has correctly determined that evidence of unadjudicated extraneous offenses may properly be admitted at the punishment phase of a capital murder trial in order to assist the jury in properly assessing punishment. Garcia v. State, 581 S.W.2d 168 (Tex.Crim.App. 1979). It cannot be denied that the prior unadjudicated offense of robbery was relevant to a determination of the future dangerousness of Petitioner, where Petitioner was positively identified as the perpetrator of the prior unadjudicated offense.

III.

THERE IS NO CONSTITUTIONAL RIGHT TO PRE-TRIAL DISCOVERY IN A CRIMINAL CASE.

Petitioner does not claim, and cannot show, that the tape recording was exculpatory or would have aided his defense. Therefore, it was not subject to pre-trial discovery under Brady v. Maryland, 373 U.S. 83 (1963).

Art. 39.14, V.A.C.C.P., upon which Petitioner relies, makes discovery discretionary with the trial court rather than mandatory. Although the trial court may have denied discovery for the wrong reason, no constitutional error is shown. "There is no general constitutional right to discovery in a criminal case, and Brady did not create one." Weatherford v. Bursey, 429 U.S. 545, 560 (1977). See also Cicenia v. LaGay, 357 U.S.

504 (1958).

Petitioner's allegation that pre-trial suppression of the inculpatory tape recording denied him the effective assistance of counsel in plea negotiations does not present a claim of constitutional magnitude under United States v. Agurs, 427 U.S., 97 (1976). See also Moore v. Illinois, 408 U.S. 786 (1972); Garrison v. Maggio, 540 F.2d 1271 (5th Cir. 1976).

The record reflects that Petitioner was personally aware of the existence of the tape recording from the date of his arrest. Petitioner was not denied a fair trial, because there was no suppression by the prosecutor of any exculpatory evidence material to the defense which would have created a reasonable doubt as to the guilt of Petitioner not otherwise in existence. United States v. Agurs, supra.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be in all things denied.

Respectfully submitted,

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